

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
)
YOUNG BROADCASTING OF SAN) File No. EB-02-IH-0786
FRANCISCO, INC.) NAL/Acct. No. 200432080010
) FRN 0004675815
Licensee, Station KRON-TV) Facility ID No. 65526
San Francisco, California)
)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 23, 2004

Released: January 27, 2004

By the Commission: Chairman Powell, and Commissioners Copps, Martin, and Adelstein issuing separate statements.

I. INTRODUCTION

1. In this Notice of Apparent Liability For Forfeiture ("NAL"), issued pursuant to section 503(b) of the Communications Act of 1934, as amended (the "Act") and section 1.80 of the Commission's rules, we find that Young Broadcasting of San Francisco, Inc. ("Young"), licensee of Station KRON-TV, San Francisco, California, aired program material during the "KRON 4 Morning News" show on October 4, 2002, that apparently violates the federal restrictions regarding the broadcast of indecent material. Based upon our review of the facts and circumstances of this case, we conclude that Young is apparently liable for a monetary forfeiture in the amount of Twenty-Seven Thousand Five Hundred Dollars (\$27,500.00), the statutory maximum in this context, for broadcasting indecent material in apparent violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

II. BACKGROUND

2. The Enforcement Bureau ("Bureau") received a complaint alleging that Station KRON-TV aired indecent material during the "KRON 4 Morning News" show on October 4, 2002, at approximately 8:25 a.m. Specifically, the complainant stated that the show's hosts interviewed performers with the stage production of "Puppetry of the Penis," who appeared in capes but were otherwise naked beneath the capes. The complainant further alleged that, during the course of the

1 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

2 See 18 U.S.C. § 1464; 47 C.F.R. § 73.3999; and 47 U.S.C. § 503(b).

3 Letter from Pamela T. Ferguson to the Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, dated October 7, 2002.

4 Id. We note that the complainant incorrectly identified the stage production as "The Penis Puppeteers."

interview, one of the performers exposed his penis while preparing to demonstrate “genital origami.”⁵

3. On May 27, 2003, the Bureau sent a letter of inquiry to Young concerning the material aired over KRON-TV on October 4, 2002, and included a copy of the complaint.⁶ Young responded to the Bureau’s letter of inquiry on July 3, 2003, and provided a videotape of the “KRON 4 Morning News” show aired between 7:00 and 9:00 a.m. on October 4, 2002.⁷ During a segment of the broadcast in question, the show’s hosts interviewed two male performers who tour with the stage production “Puppetry of the Penis.”⁸ The performers appeared on camera wearing capes and discussed their stage show, in which they appear nude in order to manipulate and stretch their genitalia to simulate a wide variety of “installations,” including objects, architecture, and people.⁹ During the course of the interview, one of the performers asked whether they could demonstrate, by stating “should we show you a couple of quick ones?”¹⁰ One of the show’s two hosts agreed, if the demonstration was done “quickly.”¹¹ As the performers stood and apparently turned away from the camera to demonstrate their act to the show’s hosts, the penis of one was fully exposed on-camera.¹²

4. Young maintains that the complained-of material, in context, does not meet the Commission’s indecency definition, and that no further action is warranted. Young acknowledges that the performer’s penis was exposed, but argues that this very brief exposure was accidental and unintentional,¹³ and that the complained-of material was part of the *bona fide* news coverage of the “Puppetry of the Penis.”¹⁴ Young also points out that, prior to the time that the segment at issue aired, the show’s hosts repeatedly referenced the subject matter of the interview segment and suggested that parents might want to prevent their children from viewing the interview.¹⁵ In addition, Young notes that, immediately following the broadcast of the complained-of material, the show’s hosts twice apologized on

⁵ *Id.*

⁶ Letter from the Chief, Investigations and Hearings Division, Enforcement Bureau, to Young Broadcasting of San Francisco, Inc., dated May 27, 2003.

⁷ See Letter from Mark J. Prak, Esquire, and Stephen Hartzell-Jordan, Esquire, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., counsel to Young Broadcasting of San Francisco, Inc., to the Investigations and Hearings Division, Enforcement Bureau, dated July 3, 2003 (“*Young Response*”) at 1. In addition, the Bureau’s supplemental letter of inquiry, issued July 29, 2003, asked Young to provide information and documentation concerning whether all or any portion of the complained-of material was broadcast over any other commonly-owned station. Letter from the Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Young Broadcasting of San Francisco, Inc., dated July 29, 2003. By letter dated August 4, 2003, Young responded that it did not broadcast all or any portion of the complained-of material over any station licensed to it other than Station KRON-TV. See Letter from Mark J. Prak, Esquire, and Stephen Hartzell-Jordan, Esquire, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., counsel to Young Broadcasting of San Francisco, Inc., to the Investigations and Hearings Division, Enforcement Bureau, dated August 4, 2003 (“*Young Supplemental Response*”) at 1.

⁸ *Young Response* at Exhibits C, D, E and F.

⁹ *Young Response* at and Exhibits D, E, and F. Specifically, the performers use their genitalia to create, among other things, likenesses of the Eiffel Tower, a hamburger, a baby kangaroo, a boomerang, public figures and movie characters.

¹⁰ *Id.* at Exhibit C, 8:22 a.m.

¹¹ *Id.* at 2 and Exhibit C, 8:22 a.m.

¹² *Id.* at Attachment 2 and Exhibit C, 8:22 a.m.

¹³ *Id.* at 1, 5, 6, 8.

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 3.

the air and, on the day of the broadcast, the station issued a press release apologizing for the incident.¹⁶ Moreover, Young states that it took disciplinary action following the broadcast by suspending station personnel involved.¹⁷

III. DISCUSSION

5. The Federal Communications Commission is authorized to license radio and television broadcast stations and is responsible for enforcing the Commission's rules and applicable statutory provisions concerning the operation of those stations. The Commission's role in overseeing program content is very limited. The First Amendment to the United States Constitution and section 326 of the Act prohibit the Commission from censoring program material and from interfering with broadcasters' freedom of expression.¹⁸ The Commission does, however, have the authority to enforce statutory and regulatory provisions restricting indecency and obscenity. Specifically, it is a violation of federal law to broadcast obscene or indecent programming. Title 18 of the United States Code, Section 1464 prohibits the utterance of "any obscene, indecent or profane language by means of radio communication."¹⁹ In addition, section 73.3999 of the Commission's rules provides that radio and television stations shall not broadcast obscene material at any time, and shall not broadcast indecent material during the period 6 a.m. through 10 p.m.

6. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.²⁰ In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.²¹ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.²² As set forth in greater detail below, we conclude under this standard that Young is apparently liable for a forfeiture for its apparent willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

¹⁶ *Id.* at 1, Attachment 1 and Exhibit I.

¹⁷ *Young Response* at 12, Exhibit H.

¹⁸ *See* 47 U.S.C. § 326.

¹⁹ 18 U.S.C. § 1464.

²⁰ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); *see also* 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 18 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

²¹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

²² *See, e.g., SBC Communications, Inc.*, Apparent Liability for Forfeiture, Forfeiture Order, 17 FCC Rcd 7589, 7591 ¶ 4 (2002)(forfeiture paid).

A. Indecency Analysis

7. Any consideration of government action against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment.²³ The federal courts consistently have upheld Congress's authority to regulate the broadcast of indecent material, as well the Commission's interpretation and implementation of the governing statute.²⁴ Nevertheless, the First Amendment is a critical constitutional limitation that demands that, in indecency determinations, we proceed cautiously and with appropriate restraint.²⁵

8. The Commission defines indecent speech as language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.²⁶

Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.²⁷

9. As an initial matter, Young does not dispute that Station KRON-TV aired adult male frontal nudity.²⁸ Because the broadcast material depicted a sexual organ, it therefore warrants further scrutiny to determine whether or not it was patently offensive as measured by contemporary community standards for the broadcast medium.²⁹

10. In our assessment of whether broadcast material is patently offensive, “the *full context* in which the material appeared is critically important.”³⁰ Three principal factors are significant to this

²³ U.S. CONST., amend. I; *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) (“*ACT I*”).

²⁴ Title 18 of the United States Code, Section 1464 (18 U.S.C. § 1464), prohibits the utterance of “any obscene, indecent or profane language by means of radio communication.” *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *See also ACT I*, 852 F.2d at 1339; *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992) (“*ACT II*”); *Action for Children's Television v. FCC*, 58 F. 3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996) (“*ACT III*”).

²⁵ *ACT I*, 852 F.2d at 1344 (“Broadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear.”). *See also id.* at 1340 n. 14 (“the potentially chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.”).

²⁶ *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987)(subsequent history omitted)(citing *Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

²⁷ *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency* (“*Indecency Policy Statement*”), 16 FCC Rcd 7999, 8002, ¶¶ 7-8 (2001) (*emphasis in original*).

²⁸ *Young Response* at 6.

²⁹ The “contemporary standards for the broadcast medium” criterion is that of an average broadcast listener and with respect to Commission decisions, does not encompass any particular geographic area. *See Indecency Policy Statement*, at 8002, ¶ 8 and n. 15.

³⁰ *Id* at 8002, ¶ 9 (*emphasis in original*).

contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock.³¹ In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive because “[e]ach indecency case presents its own particular mix of these, and possibly, other factors.”³² In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,³³ or, alternatively, removing the broadcast material from the realm of indecency.³⁴ In this case, we examine all three factors and determine that, in context and on balance, the complained-of material is patently offensive as measured by contemporary community standards for the broadcast medium. We note that, in particular, the station’s presentation of full frontal nudity in a manner that was pandering, titillating and shocking weighs heavily in this determination.

11. First, Young admits that there was an actual depiction of the male genitalia. However, Young argues that because the exposure of the performer’s penis was accidental and the duration of the exposure was very limited, the material is not graphic or explicit. We disagree, finding that assertions that the exposure was fleeting and unintentional are more appropriate to the analysis under the second and third factors, as discussed below. We find that in the context presented here, the depiction of adult male frontal nudity was graphic and explicit.

12. Second, although the actual exposure of the performer’s penis was fleeting in that it occurred for less than a second, the manner in which the station presented this material establishes, under the third factor, that, in its overall context, the material was apparently intended to pander to, titillate and shock viewers. Thus, we reject Young’s assertion that this material is equivalent to other instances in which the Commission has ruled that fleeting remarks in live, unscripted broadcasts do not meet the indecency definition.³⁵

13. The record here demonstrates that the station failed to take adequate precautions to ensure that no actionably indecent material was broadcast despite its awareness that the interview

³¹ *Indecency Policy Statement* at 8002-15, ¶¶ 8-23.

³² *Id.* at 8003, ¶ 10.

³³ *Id.* at 8009, ¶ 19 (citing *Tempe Radio, Inc. (KUPD-FM)*, 12 FCC Rcd 21828 (MMB 1997) (forfeiture paid) (extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references); *EZ New Orleans, Inc. (WEZB(FM))*, 12 FCC Rcd 4147 (MMB 1997) (forfeiture paid) (same)).

³⁴ *Indecency Policy Statement*, at 8010, ¶ 20 (“the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding”).

³⁵ Young cites *Flambo Broadcasting, Inc. (KFMH-FM)*, Notice of Apparent Liability for Monetary Forfeiture, 9 FCC Rcd 1681 (MMB 1994). However, in that case, no action was taken with regard to a radio station’s broadcast of sexual material in a crude joke, because there was a conflict as to what was actually broadcast, and no tape or other evidence to establish the language broadcast and when the licensee cut off the outside caller’s rendition of the joke. Nevertheless, assuming that the joke was cut off immediately, the staff of the then-Mass Media Bureau found that it would not have been actionably indecent because it was brief, live, unscripted and from an outside source. Young also cites *L.M. Communications of South Carolina, Inc. (WYBB(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 7 FCC Rcd 1595 (MMB 1992), in which a fleeting and an isolated utterance, within the context of a live and spontaneous broadcast, was found not actionably indecent. See also *Indecency Policy Statement*, 16 FCC Rcd at 8009, ¶ 18, setting forth the utterance broadcast in *L.M. Communications*: “The hell I did, I drove the mother-fucker, oh. Oh.” In addition, Young cites a contested license renewal in which a news announcer’s utterance, “Oops, fucked that one up,” was found not to warrant further action in light of the isolated and accidental nature of the broadcast. *Lincoln Dellar (KPRL(AM) and KDDB(FM))*, 8 FCC Rcd 2582, 2585 ¶ 26 (MMB 1993). These cases are distinguishable because there was no finding that the material, in context, was pandering, titillating or intended to shock the audience.

involved performers who appear nude in order to manipulate and stretch their genitalia.³⁶ Under these circumstances, the airing of indecent material during the interview was clearly foreseeable.³⁷ Here, we find inherently not credible Young's assertion that certain station personnel were unaware that the performers were nude beneath the capes worn on-camera.³⁸ At the beginning of the segment, one of the show's hosts explains that the "Puppetry of the Penis" "begins [...] with two naked performers in capes with us this morning [...]."³⁹ The performers later acknowledged, when asked by the show's hosts, that they perform wearing nothing more than capes, which are discarded after four minutes, shoes and socks, and that one of them also wears a hat.⁴⁰ Moreover, the segment, as broadcast, includes comments of station personnel who are off the set, and who urge the performers to demonstrate by stating, "let's see it."⁴¹ One of the show's hosts responds to the comment, stating, "Jan and Janelle, they're tired of the talking[...]."⁴² The segment also includes camera shots of these women off the set as they observe the performers' manipulation of their genitalia.⁴³ In addition, following the actual exposure of the performer's penis and the off-set shots, the show's cameras were directed only to the performers' upper bodies as they continued to demonstrate a portion of their act, displaying their penises off-camera.⁴⁴ This indicates that the station purposefully set up its cameras to attempt to avoid full frontal body shots, even though this effort ultimately was unsuccessful.

14. Young nevertheless argues that the complained-of material was not aired to pander to or titillate the audience, nor was it broadcast for its shock value.⁴⁵ Young thus maintains that the material at issue here was not patently offensive for the same reasons that the Commission ruled that frontal adult nudity depicted in a broadcast of the film *Schindler's List* was not patently offensive.⁴⁶ We disagree. In that decision, the Commission held that the staff of the then-Mass Media Bureau had properly concluded that a broadcast of this film was not patently offensive as measured by contemporary community standards for the broadcast medium, based upon the full context of its presentation, including the subject matter of the film, the manner of presentation, and the warnings that accompanied the broadcast of the film. The staff determined, and the Commission agreed, that in the particular broadcast of the film at issue, the depiction of adult frontal nudity was incidental to the broadcast material's rendering of a historical view of World War II and wartime atrocities, which, viewed in context, was not presented in a

³⁶ *Id.* at Attachment 2, ¶ 4 (Declaration of KRON-TV's then-Executive Producer stating that she "gave great consideration to the wisdom of such an interview.").

³⁷ *CBS Radio License, Inc. (WLLD(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 15 FCC Rcd 23881, 23883, ¶ 8 (EB 2000)(given licensee's awareness of the actual language used in performers' recordings, it should have taken precautions to avoid airing material meeting the indecency definition during a live, unscripted broadcast), Apparent Liability for Forfeiture, Forfeiture Order, 16 FCC Rcd 4825 (EB 2001), Memorandum Opinion and Order denying reconsideration of Forfeiture Order, 17 FCC Rcd 18339 (EB 2002)(application for review pending); *Regent Licensee of Flagstaff, Inc., (KZGL(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 15 FCC Rcd 17286, 17288, ¶ 9 (EB 2000)(forfeiture paid).

³⁸ *Young Response* at 2 and Attachment 2, ¶ 6.

³⁹ *Id.* at Exhibit C, 8:17 a.m.

⁴⁰ *Id.* at Exhibit C, 8:19 a.m.

⁴¹ *Id.* at Exhibit C, 8:21 a.m.

⁴² *Id.* at Exhibit C, 8:22 a.m.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 10.

⁴⁶ *Id.* at 10-11, citing *WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV)*, 15 FCC Rcd 1838 (2000).

pandering, titillating or vulgar manner.⁴⁷ By contrast, the manner of presentation of the complained-of material over Station KRON-TV, for which the licensee failed to take adequate precautions, was pandering, titillating and shocking, as discussed above. We note, in particular, the off-camera employees' comments urging the performers to conduct a nude demonstration, and the partially off-camera demonstration to the show's hosts.⁴⁸ Considering the overall context of the segment, the presence of warnings issued by the station is not a sufficient basis on which to conclude that the complained-of material is not patently offensive.⁴⁹ Nor do we find that Young's apologies to Station KRON-TV viewers and the disciplinary actions taken against certain station employees following the broadcast mitigate its liability for violation of the statute and the Commission's rules.⁵⁰ We find that the weight of the pandering, titillating and shocking manner of presentation, coupled with the graphic and explicit nature of the adult male frontal nudity, renders this broadcast indecent under the statute.

15. It is undisputed that the complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules. Thus, because there was a reasonable risk that children may have been in the audience at the time that the material at issue was broadcast on October 4, 2002, the broadcast is legally actionable.⁵¹ By airing this material, Young apparently violated the prohibitions in 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules, the rule against broadcast indecency.

B. Proposed Forfeiture

16. Based upon our review of the record in this case, we conclude that Young is apparently liable for the willful violation of our rules. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$7,000 for transmission of indecent or obscene materials.⁵² The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."⁵³ In this case, taking all of these factors into consideration, we find that Young is apparently liable for a forfeiture of \$27,500.00, which is the statutory maximum. Based upon our review of the entire record, we

⁴⁷ *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd at 1839-40, ¶¶ 3,13.

⁴⁸ See ¶ 13, *supra*.

⁴⁹ See, e.g., *Emmis Radio License Corporation (WKQX(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 17 FCC Rcd 5263, 5267 ¶ 13 (EB 2002), Apparent Liability for Forfeiture, Forfeiture Order, 17 FCC Rcd 21697 (EB 2002)(petition for reconsideration of Forfeiture Order pending); *Citicasters Co. (KEGL(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 7546, 7547, ¶6 (EB 2001) (forfeiture paid) (licensee's warnings to listeners that program may contain material "more suitable for adults" has no bearing on whether a forfeiture should be imposed for material that is actionably indecent).

⁵⁰ See, e.g., *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002) (remedial actions not a basis for mitigation); *Eure Family Limited Partnership*, 17 FCC Rcd 21861 (2002) (licensee responsible for actions of its employees).

⁵¹ See *ACT III*, 58 F.3d at 660-63.

⁵² *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997), *recon. denied* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. § 1.80(b). The Commission recently amended its rules to increase the maximum penalties to account for inflation since the last adjustment of the penalty rates. The new rates apply to violations that occur or continue after November 13, 2000. See *Order, In the Matter of Amendment of Section 1.80(b) of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000).

⁵³ *Forfeiture Policy Statement*, 12 FCC Rcd at 1710-01, ¶ 27.

believe that this upward adjustment is warranted. The broadcast was extremely graphic and titillating. Given the fact that the licensee broadcast material involving performers who appear nude in order to manipulate their genitalia, and who were in fact nude during the interview except for easily removed capes, the licensee failed to take adequate precautions to prevent the broadcast of indecent material. Consequently, the egregious nature of the violation and the degree of culpability justify an increase to the maximum statutory amount.

IV. ORDERING CLAUSES

17. ACCORDINGLY, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules,⁵⁴ that Young Broadcasting of San Francisco, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of Twenty-Seven Thousand Five Hundred Dollars (\$27,500.00) for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

18. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, that within thirty (30) days of the release of this Notice, Young SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

19. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment MUST INCLUDE the FCC Registration Number ("FRN")(0004675815) and also should note the NAL/Account Number (200432080010).

20. The response, if any, must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B443, Washington D.C. 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

21. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

22. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.⁵⁵

23. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If Young qualifies as a small entity and if it wishes to be treated as a small entity for tracking purposes, it should so certify to us within thirty (30) days of this NAL, either in its response to the NAL or in a separate filing to be sent to the Investigations and Hearings Division. The certification should indicate whether Young, including its parent entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC's Office of Communications Business Opportunities ("OCBO")

⁵⁴ 47 C.F.R. § 1.80.

⁵⁵ See 47 C.F.R. § 1.1914.

set forth in Attachment A of this Notice of Apparent Liability. This information will be used for tracking purposes only. Young's response or failure to respond to this question will have no effect on its rights and responsibilities pursuant to Section 503(b) of the Communications Act. If Young has questions regarding any of the information contained in Attachment A, it should contact OCBO at (202) 418-0990.

24. Accordingly, IT IS ORDERED, that the complaint filed against Station KRON-TV's broadcast on October 4, 2002, IS GRANTED to the extent indicated herein, AND IS OTHERWISE DENIED, and the complaint proceeding IS HEREBY TERMINATED.⁵⁶

25. IT IS FURTHER ORDERED, that a copy of this *Notice of Apparent Liability For Forfeiture* shall be sent by Certified Mail Return Receipt Requested to Paul Dinovitz, President and General Manager, Young Broadcasting of San Francisco, Inc., 1001 Van Ness Avenue, San Francisco, California 94109 and to Young's counsel, Mark J. Prak, Esquire and Stephen Hartzell-Jordan, Esquire, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., Wachovia Capitol Center, Suite 1600 (27601), Post Office Box 1800, Raleigh, North Carolina 27602, and to Pamela T. Ferguson.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁶ Consistent with section 503(b) of the Act and consistent Commission practice, for the purposes of the forfeiture proceeding initiated by this NAL, Young shall be the only party to this proceeding.

ATTACHMENT A

FCC List of Small Entities

As described below, a “small entity” may be a small organization, a small governmental jurisdiction, or a small business.

(1) Small Organization	
Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.	
(2) Small Governmental Jurisdiction	
Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.	
(3) Small Business	
Any business concern that is independently owned and operated and is not dominant in its field, <i>and</i> meets the pertinent size criterion described below.	
Industry Type	Description of Small Business Size Standards
<i>Cable Services or Systems</i>	
Cable Systems	Special Size Standard – Small Cable Company has 400,000 Subscribers Nationwide or Fewer
Cable and Other Program Distribution	\$12.5 Million in Annual Receipts or Less
Open Video Systems	
<i>Common Carrier Services and Related Entities</i>	
Wireline Carriers and Service providers	1,500 Employees or Fewer
Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers	

Note: With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 CFR 121.104 and 13 CFR 121.106, respectively.

<i>International Services</i>	
International Broadcast Stations	\$12.5 Million in Annual Receipts or Less
International Public Fixed Radio (Public and Control Stations)	
Fixed Satellite Transmit/Receive Earth Stations	
Fixed Satellite Very Small Aperture Terminal Systems	
Mobile Satellite Earth Stations	
Radio Determination Satellite Earth Stations	
Geostationary Space Stations	
Non-Geostationary Space Stations	
Direct Broadcast Satellites	
Home Satellite Dish Service	
<i>Mass Media Services</i>	
Television Services	\$12 Million in Annual Receipts or Less
Low Power Television Services and Television Translator Stations	
TV Auxiliary, Special Broadcast and Other Program Distribution Services	
Radio Services	\$6 Million in Annual Receipts or Less
Radio Auxiliary, Special Broadcast and Other Program Distribution Services	
Multipoint Distribution Service	Auction Special Size Standard – Small Business is less than \$40M in annual gross revenues for three preceding years
<i>Wireless and Commercial Mobile Services</i>	
Cellular Licensees	1,500 Employees or Fewer
220 MHz Radio Service – Phase I Licensees	
220 MHz Radio Service – Phase II Licensees	Auction special size standard - Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and controlling principals) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and controlling principals)
700 MHz Guard Band Licensees	
Private and Common Carrier Paging	1,500 Employees or Fewer
Broadband Personal Communications Services (Blocks A, B, D, and E)	
Broadband Personal Communications Services (Block C)	
Broadband Personal Communications Services (Block F)	
Narrowband Personal Communications Services	
	Auction special size standard - Small Business is \$40M or less in annual gross revenues for three previous calendar years Very Small Business is average gross revenues of \$15M or less for the preceding three calendar years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)

Rural Radiotelephone Service	1,500 Employees or Fewer
Air-Ground Radiotelephone Service	
800 MHz Specialized Mobile Radio	Auction special size standard -
900 MHz Specialized Mobile Radio	Small Business is \$15M or less average annual gross revenues for three preceding calendar years
Private Land Mobile Radio	1,500 Employees or Fewer
Amateur Radio Service	N/A
Aviation and Marine Radio Service	
Fixed Microwave Services	1,500 Employees or Fewer
Public Safety Radio Services	Small Business is 1,500 employees or less Small Government Entities has population of less than 50,000 persons
Wireless Telephony and Paging and Messaging	1,500 Employees or Fewer
Personal Radio Services	N/A
Offshore Radiotelephone Service	1,500 Employees or Fewer
Wireless Communications Services	Small Business is \$40M or less average annual gross revenues for three preceding years
39 GHz Service	Very Small Business is average gross revenues of \$15M or less for the preceding three years
Multipoint Distribution Service	Auction special size standard (1996) – Small Business is \$40M or less average annual gross revenues for three preceding calendar years Prior to Auction – Small Business has annual revenue of \$12.5M or less
Multichannel Multipoint Distribution Service	\$12.5 Million in Annual Receipts or Less
Instructional Television Fixed Service	
Local Multipoint Distribution Service	Auction special size standard (1998) – Small Business is \$40M or less average annual gross revenues for three preceding years Very Small Business is average gross revenues of \$15M or less for the preceding three years
218-219 MHz Service	First Auction special size standard (1994) – Small Business is an entity that, together with its affiliates, has no more than a \$6M net worth and, after federal income taxes (excluding carryover losses) has no more than \$2M in annual profits each year for the previous two years New Standard – Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Satellite Master Antenna Television Systems	\$12.5 Million in Annual Receipts or Less
24 GHz – Incumbent Licensees	1,500 Employees or Fewer
24 GHz – Future Licensees	Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)

<i>Miscellaneous</i>	
On-Line Information Services	\$18 Million in Annual Receipts or Less
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers	750 Employees or Fewer
Audio and Video Equipment Manufacturers	
Telephone Apparatus Manufacturers (Except Cellular)	1,000 Employees or Fewer
Medical Implant Device Manufacturers	500 Employees or Fewer
Hospitals	\$29 Million in Annual Receipts or Less
Nursing Homes	\$11.5 Million in Annual Receipts or Less
Hotels and Motels	\$6 Million in Annual Receipts or Less
Tower Owners	(See Lessee's Type of Business)

**SEPARATE STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

Re: Young Broadcasting of San Francisco, Inc., Licensee, Station KRON-TV, San Francisco, Notice of Apparent Liability for Forfeiture

Today, we open another front in our increased efforts to curb indecency on our nation's airwaves by focusing on indecency on television. I believe it is irresponsible of our country's programmers and broadcasters to continue to try and push the envelope in the face of Commission policies aimed at balancing the needs to protect our children with the interests of the First Amendment. Where, as here, we believe that a broadcast crosses that line, we will continue to enforce our indecency rules with vigor.

**SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: Young Broadcasting of San Francisco, Inc., Licensee, Station KRON-TV, San Francisco, Notice of Apparent Liability for Forfeiture (“NAL”)

I am pleased that this Commission is finally taking an initial step against indecency on television. That being said, I am disappointed that this complaint was filed over 15 months ago and we are just now addressing it. When we allow complaints to languish for over a year, the message is loud and clear that the FCC is not serious about enforcing our nation’s laws. Meanwhile, numerous other complaints about indecency on television remain unaddressed. I hope we will take up those complaints expeditiously. The time has come for this Commission to take a firm stand against the “race to the bottom” on the public’s airwaves.

**SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

*Re: Young Broadcasting of San Francisco, Inc., Licensee, Station KRON-TV, San Francisco,
Notice of Apparent Liability for Forfeiture*

I support the strong action the Commission is taking today to enforce our indecency regulations. While hard to believe, this appears to be only the second time the Commission has ever found a television broadcast to be indecent. I hope that this step today represents the beginning of a commitment to consider each indecency complaint seriously, and to recognize that indecency on our airwaves is not limited to the radio.

**SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Young Broadcasting of San Francisco, Inc., Licensee, Station KRON-TV, San Francisco, Notice of Apparent Liability for Forfeiture

I strongly support the action we take today to combat indecency on broadcast television. The Commission has a duty to enforce statutory and regulatory provisions restricting broadcast indecency. The material broadcast in this case clearly warrants the statutory maximum \$27,500 fine. I hope that today's action will continue to remind broadcasters of their responsibility to serve the public interest and protect children from indecency on the airwaves. Today's action continues a series of measures indicating that the Commission is stepping up its enforcement against indecency on the airwaves.